No. 10-48

IN THE

Supreme Court of the United States

INTERIOR/EXTERIOR SPECIALIST COMPANY,
a Michigan Corporation, d/b/a Interior/Exterior Specialists;
THE LLAMAS GROUP CORPORATION,
a Michigan corporation, and RITO JULIAN LLAMAS,
individually, jointly and severally,

Petitioners,

v.

TRUSTEES OF THE PAINTERS UNION
DEPOSIT FUND, a voluntary unincorporated trust,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

STEPHEN D. KURSMAN
FINKEL WHITEFIELD SELIK
32300 Northwestern Highway
Suite 200
Farmington Hills, MI 48334-1567
(248) 855-6500
SKursman@FWSLaw.com

Attorneys for Respondent

231448

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE PETITIONERS HAVE PRESENTED COMPELLING REASONS TO GRANT THE PETITION, WHEN THE LOWER COURTS' ANALYSIS OF THE EVIDENCE AND ALTER EGO LAW DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR A COURT OF APPEALS NOR DOES IT IMPLICATE AN IMPORTANT FEDERAL QUESTION THAT THIS COURT HAS NOT SETTLED?

2. WHETHER PETITONERS HAVE PRESENTED COMPELLING REASONS THE COURT SHOULD GRANT THE PETITION RESPECTING THE ALLEGED VIOLATION OF THE SETTLEMENT AGREEMENT ENTERED INTO BY THE PAINTERS UNION DEPOSIT FUND ("PUDF") IN THE NLRB CONCERNING ALTER EGO ALLEGATIONS WHEN THE PUDF ONLY AGREED TO DISMISS ITS THEN PENDING COMPLAINT WITHOUT PREJUDICE THEREBY RESERVING ITS RIGHT TO RE-FILE THE CASE AT A LATER DATE?

3. WHETHER THE ALTER EGO DOCTRINE PROHIBITS A FINDING THAT NON UNION THE LLAMAS GROUP CORPORATION ("TLG") IS AN ALTER EGO THAT CAN BE HELD TO ALL PROVISIONS OF UNION INTERIOR/EXTERIOR SPECIALIST COMPANY'S ("IES") COLLECTIVE BARGAINING AGREEMENT IN LIGHT OF OVERWHELMING EVIDENCE THAT NON UNION TLG WAS A DISGUISED CONTINUANCE OF UNION IES?

4. WHETHER THE ALTER EGO DOCTRINE PROHIBITS A FINDING THAT NON UNION TLG WAS AN ALTER EGO OF UNION IES WHEN THE TWO ENTITIES HAVE SUBSTANTIALLY IDENTICAL MANAGEMENT, BUSINESS PURPOSES, OPERATIONS, EQUIPMENT, CUSTOMERS, SUPERVISION AND OWNERSHIP?

5. WHETHER THE ALTER EGO DOCTRINE PROHIBITS A FINDING THAT NON UNION TLG IS AN ALTER EGO OF UNION IES IN LIGHT OF PROOF OF ACTUAL EVASION OF LABOR OBLIGATIONS AND OF A DISGUISE INTENDED TO EVADE LABOR OBLIGATIONS?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The caption to the case contains the names of all parties in the case.

Respondent Trustees of the Painters Union Deposit Fund state that they are a voluntary unincorporated trust. As such, it has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The decision of the Sixth Circuit neither conflicts with a decision of this Court or any Court of Appeals nor does it implicate a federal question that this Court has not decided. The Trustees of the Painters Union Deposit Fund (the "PUDF") sought damages against the defendants for breach of their collective bargaining agreement. The Sixth Circuit found that the District Court's extensive factual findings of alter ego were not clearly erroneous and also found that the defendants had breached their obligations to pay certain fringe benefits to the Fund. The fact intensive nature of this case, the fact intensive nature of the alter ego doctrine, the equitable judgments made by the Courts of Appeals and District Courts in applying the alter ego doctrine, and the uniform application of the alter ego standards by the various Circuit Courts, all mandate that this case is not appropriate for Supreme Court review.

The District Court issued its ruling in a detailed, thoughtful, well-reasoned and legally supported opinion. Review of the record reveals that Petitioners' arguments consist of brazen misrepresentations of both lower courts' findings and legal conclusions and disagreements with the District Court's factual findings. Accordingly, this Court should deny the Petition.

STATEMENT OF THE CASE AND GOVERNING FACTS

A. The Parties

IES is a Michigan corporation owned by Mr. Llamas and TLG is a Michigan corporation owned by Mrs. Llamas. IES was signatory to a collective bargaining agreement ("c.b.a.") with the Union. The c.b.a. covers the period from October 5, 1998 through May 31, 2004, (RE. 98, Opinion and Order, pp. 3-4; App 26a.). Respondent, PUDF is a third-party beneficiary of the c.b.a.

B. The Purpose and Function of the PUDF

The PUDF is a "collection fund" which exists "for the purpose of centralizing the payments required of Employers" for health insurance, pension, vacation, apprentice training and related programs for employees employed under the agreement (and similar agreements with other contributing employers). (RE. 84-2 PUDF Brief in Support of Motion for Summary Judgment as to Liability against IES and Llamas, Ex. A. c.b.a., p. 8) Article XVIII, Section 1. PUDF is responsible for collecting fringe benefit contributions from contributing employers, including IES/TLG, and for allocating those contributions between the relevant funds. The c.b.a. specifies the wages and fringe benefit contributions that are to be paid for each hour worked by covered employees. *See id*, Article III.

PUDF enforces the obligations of contributing employers to report covered work hours and to collect

from contributing employers the required fringe benefit contributions for hours worked by covered employees. The c.b.a provides for a PUDF auditor "to have access to, and to inspect any and all books, records, accounts, ledgers and records of original entry, for the purpose of determining whether or not the Employer has conformed with the provisions of this Agreement", known as a "comprehensive audit." *See id.*, Article XVIII, Section 2.

C. IES's Initial Refusal in 2003 to Allow A Comprehensive Audit

The action below arose from the results of a comprehensive audit of IES and TLG, PUDF ultimately performed in 2005. PUDF initially attempted to review IES's books and records through its own express order of September 23, 2003, (RE. 87, Plaintiffs' Brief in Response to Defendants' Motion for Partial Summary Judgment, p. 2). IES's refusal forced PUDF to file a complaint against IES on February 12, 2004 in the District Court (RE. 87-4, February 12, 2004 complaint). Shortly thereafter, IES notified the Union by letter dated March 23, 2004, that it would not be renewing its contract with the Union, (RE. 86-6, IES/TLGs' Motion for Partial Summary Judgment, termination letter, Ex. E.). Based upon this notice, the c.b.a. was set to expire on May 31, 2004, (RE. 84-2, Ex. A, c.b.a., p. 12, Art. XXIII), in the absence of the subsequent negotiation of a new c.b.a. (RE. 158, trial transcript vol. four, pp. 7-13, testimony of Union officer Robert Kennedy).

D. The Settlement Agreement Dated May 21, 2004 Between IES and the Union

IES and the Union entered into a settlement agreement on May 21, 2004 ("Settlement Agreement") pursuant to which the Union agreed to (RE. 87-5, Exhibit D, settlement agreement) withdraw a 2003 N.L.R.B. charge alleging an illegal double-breasted operation between IES and TLG. (RE. 86-11, N.L.R.B. Charge, Exh. J). The Settlement Agreement precluded TLG from serving as a painting contractor and required it to subcontract any painting work it might acquire to either IES or to a contractor having a labor contract with the Union. In return, the Union agreed to withdraw its then-pending unfair labor practice charge and to recommend that PUDF dismiss the then-pending lawsuit "*without prejudice*". (RE. 87-5, exh. D). Union officer Robert Kennedy testified the goal of the Settlement Agreement was to allow IES and the Union to be able to move forward and work together as a union contractor and a union (RE. 158, transcript, vol. four, p. 17).

E. PUDF's Dismissal of the Initial Complaint

In connection with the Settlement Agreement, PUDF dismissed its initial complaint on June 4, 2004 *without* prejudice and *prior* to PUDF conducting an audit. (RE. 87-6, Plaintiffs Brief in Response to Defendants' Motion for Partial Summary Judgment, Exhibit E, Stipulated Dismissal Without Prejudice).

PUDF was *neither a party nor a signatory* to the settlement agreement. By dismissing the claim without

prejudice, PUDF expressly reserved the right to subsequently request and/or file suit to compel the comprehensive audit to the extent such action was deemed necessary. IES, represented by counsel, expressly stipulated to the dismissal ***without prejudice***. *Id.*

F. IES Notifies Union That it was Not Renewing the C.B.A.

In early December of 2004, Mr. Llamas notified Mr. Kennedy that he did not intend to re-sign the c.b.a. (RE. 158, trial transcript, vol. four, pp. 22, 29, 33 and 57, testimony of Robert Kennedy).

G. PUDF Orders a Comprehensive Audit Based Upon IES Employee Complaints of The Failure To Pay Benefits

On December 14, 2004, PUDF received notice that three IES employees, Daniel Chaney, Mark E. Chaney and George Lancaster had filed written grievance reports with the Union, dated December 6, 2004. (RE. 87, PUDF' Brief in Response to Defendants' Motion for Partial Summary Judgment, p. 4 and RE. 87-10, Exh. I) The written grievance reports complained of IES' failure to pay their fringe benefits in November of 2004. Based on these written grievance reports, on December 14, 2004 PUDF again ordered a comprehensive audit on all books and related records of IES for the period of September 1, 2001 to date of completion of the audit, pursuant to Article XVIII, Section Two of the c.b.a.

H. IES and TLG Refuse PUDF's Request For an Audit Leading to the Filing of the Instant Case

IES initially refused to permit the comprehensive audit, leading to the filing of the instant case on January 11, 2005. The complaint expressly requested a comprehensive audit of both IES and TLG. (RE. 1, complaint, p. 7-8). IES continued to refuse the comprehensive audit, causing PUDF to file a motion to compel a comprehensive audit of both IES and TLG (RE. 13, comprehensive audit motion). ***In lieu of the filing of a response, IES and TLG instead both voluntarily agreed to produce their books and records***. (District Court Docket Sheet, APPX. Of Defendants, p. 6, unnumbered minute entry notation, dated June 22, 2005, appearing after RE. 23 and before RE. 24, stating "terminate motions" and referencing RE. 13). PUDF completed the comprehensive audit debit memo on June 16, 2005, (RE. 87-3, Plaintiffs' Brief in Response to Defendants' Motion For Partial Summary Judgment, Ex. B, 6/16/05 debit memo, pp. 7-10). After meeting with Mrs. Llamas, and reviewing her computations of the amount of alter ego liability that would exist if that liability were found, PUDF adjusted and revised the comprehensive audit debit memo (*Id.*, Ex. B, pp. 1-6; RE. 152, trial transcript, vol. one, pp. 35-36, testimony of Jeffrey Ruehle).

I. The Comprehensive Audit Confirmed That IES Was Using TLG to Evade Its C.B.A Fringe Benefit Payment Obligations

PUDF based its audit on IES and TLG's actual books and records and limited its scope only to employees who, according to PUDF records, were painters and whose employment was shared between IES and TLG. (RE. 87-11, exh. J, ¶ three). PUDF determined that the amount of liability from the comprehensive audit through May 31, 2004 was $186,781.62. (*Id*, exh. J, ¶ ten).

The audit revealed that IES and TLG were transferring large amounts of money to one another, with the principals purportedly having no knowledge or understanding of the purpose for such transfers. The audit revealed IES and TLG were so financially and operationally intertwined that IES's use of TLG and its employees deprived the Union from receiving what it bargained for under the c.b.a.

1. *TLG and IES Use The Same Employees Interchangeably*

The comprehensive audit exposed IES and TLG's continual and persistent exchange of the same employees during the audit period at the whim of the Llamases. (RE. 87-11, Plaintiffs' Brief in Response to Defendants' Motion for Partial Summary Judgment, Exh J., affidavit of Jeffrey Ruehle).

It confirmed that most of the TLG employees were also employees of IES (RE. 152, trial transcript, vol. one,

p. 44), many worked for both at the same time, and the same employees bounced back and forth (*id.* at 44-45) at the will of Mr. and Mrs. Llamas. Mrs. Llamas admitted that employees could have gone back and forth in the same month (RE. 154, trial transcript, vol. two, pp. 90, 98), that TLG hired some of the IES employees and that some of the TLG employees also worked for IES (*id.* at 10-11; *see also* 76-79). During the years of 2001 and 2002, the percentage of IES employees also appearing on the TLG payroll exceeded fifty percent! (RE. 152, trial transcript, vol. one, p. 45). The audit also revealed Mrs. Llamas appearing on the IES payroll and Mr. Llamas appearing on the TLG payroll (RE. 87-11, exh. J affidavit of Jeffrey Ruehle, p.5 ¶6; RE. 152, trial transcript, vol. one, p. 54). Significantly, IES paid Mrs. Llamas $50,400.00 in 2001 and $13,600.00 during 2002. Similarly, TLG paid Mr. Llamas $56,000.00 in 2001 (RE. 87-11, exh. J affidavit of Jeffrey Ruehle, p.5, ¶6).

The audit confirmed that painting employees freely floated between TLG and IES depending on which company had work to do (RE. 136 Findings of Fact and Conclusions of Law, ¶¶ 34-36; App. 30a). "The amount of liability from the comprehensive audit through May 31, 2004 only is $186,781.62." (RE: 87-11, exh. J, Affidavit of Jeffrey Ruehle, p. 6, ¶10).

2. TLG and IES were Financially and Operationally Indistinguishable—a true poster child for violation of the alter ego Doctrine

The audit further confirmed that TLG and IES exchanged large sums of money by way of either undocumented loans or subcontract payments (RE. 152, trial transcript, vol. one, p. 55). To obscure these substantial transfers of money, their respective check registers reflected the transfers as an innocuous "accounts payable/trade" (RE. 136, Findings, ¶ 43; App. 31a).

Moreover, the evidence irrefutably established that IES and TLG's business operations were interchangeable. For example, IES and TLG are both located at the same building owned by the Llamases (RE. 152, trial transcript, vol. one, p. 134). TLG used laid off IES employees for painting (*id.*, pp. 134-135). Despite being the owner of TLG and allegedly having no managerial involvement with IES, Mrs. Llamas signed the IES State of Michigan filing for 2003 *as President of IES*, PUDF APP'X p. 665, exh. 37, (RE. 152, trial transcript, vol. one, pp. 136-37). Mr. and Mrs. Llamas together worked on the IES check register, (RE. 152, trial transcript, vol. one, pp. 140-142). Mrs. Llamas could sign IES checks (RE. 152, trial transcript, vol. one, p. 197; RE. 136, Findings, ¶21).

Moreover, Mr. Llamas admitted that one company would loan funds to the other company and "the accountants would take care of it" (RE. 152, pp. 173, 178). There was unbridled commingling of funds between IES and TLG with no accounting for same.

Furthermore, the Llamases handled all loans between TLG and IES by verbal agreement, and there were no promissory notes or other written evidence of indebtedness between TLG and IES (RE. 152, pp. 177-178). IES could not explain why it tendered five checks totaling in excess of $7,000.00 to Mrs. Llamas. (RE. 152, trial transcript, vol. one, pp. 142-148; PUDF APP'X, pp. 626, 628, 633, 634, exh. 11, check copies; RE. 136, Findings, ¶ 27; App. 29a). Similarly, Mrs. Llamas signed several IES checks, in an amount exceeding $28,000, with no knowledge or explanation of the purpose for those checks. (*see* RE. 152, trial transcript, vol. one, pp. 142-150; RE. 136, Findings, ¶ 28; App. 29a). (The total value of IES checks contained in PUDF APP'X exh. 11 with signatures purporting to be that of Mrs. Llamas exceeds $200,000.00). Likewise, IES could not explain a bank charge for $20,000.00 with the notation "to Llamas." (RE. 152, trial transcript, vol. one, pp. 143-144; *see* PUDF APP'X pp. 631-32, exh 11; *see* RE. 136, Findings, ¶ ¶28, 29; App. 29a).

The purported management and equipment rental fees TLG paid to IES further evidence the operational and financial unity of these entities. TLG paid management revenue of $106,254.00 to IES in 2003. (RE. 152, trial transcript, vol. one, pp. 151-154; PUDF APP'X p. 655, exh. 25b, p. 533; PUDF APP'X pp. 650-51, exh. 17, 2002 IES tax return, line ten and accompanying Federal Statement for line ten; RE. 136, Findings, ¶ 44; App. 31a). Mr. Llamas could not explain how he determined the amount of the management fee, did not recall what IES did to earn it, and did not recall anything being in writing for the fee (RE. 152, trial transcript, vol. one, pp. 155-156, 165).

Similarly, IES charged TLG $71,200.00 for equipment rental, even though no equipment was rented! (RE. 154, transcript, vol. two, p. 42), (RE. 152, trial transcript, vol. one, pp. 156-157; R 136, Findings, ¶ 45; App. 31a-32a). (R 152, trial transcript, vol. one, pp. 162, 166). There was nothing in writing to reflect this transaction. (R 152, trial transcript, vol. one, pp. 162, 166). Significantly, the management fee and equipment rental revenue IES received from TLG in 2003 constituted thirty nine percent of IES's total income for the year! (RE. 152, trial transcript, vol. one, pp. 164-165; RE. 136, Findings, ¶ 50; App. 32a).

Further evidence of the lack of any material distinction between IES and TLG is persistent subcontracting of IES work to TLG to avoid its fringe benefit obligations. (RE. 152, trial transcript, vol. one, p. 151; PUDF APP'X p. 652, exh. 25b, pp. 66, 78, 97 and 533; RE. 136, Findings, ¶ 77; App. 40a). There were no agreements evidencing loans, and no written agreements evidencing subcontracting, (RE. 154, transcript, pp. 35-36).

PUDF's expert testified that (RE. 154, pp. 110, 146-47) IES and TLG's accountant treated the entities as one company by moving income and expenses between the two without any recognition that they were separate and distinct entities. (RE. 154, transcript, pp. 123, 142; RE 136, Findings, ¶ 66; App. 35a).

He also opined that IES and TLG were so financially and substantially intertwined that no one could consider them financially separate from one another. (RE. 87-18, PUDF Brief in Response to Defendants' Motion for

Partial Summary Judgment, exh. Q, Scheuer affidavit, p. 5, ¶ 11; RE. 154, transcript, pp. 129-30, 135; Findings, RE. 136, ¶ 68; App. 35a-36a).

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT AND THE SIXTH CIRCUIT PROPERLY PERMITTED PUDF TO ENFORCE IES'S FRINGE PAYMENT OBLIGATIONS UNDER THE COLLECTIVE BARGAINING AGREEMENT

A. The Settlement Agreement Expressly Provided for an Already Existing Lawsuit For Fringe Benefits to be Dismissed Without Prejudice, Making it Clear that PUDF could file a Future Lawsuit for Fringe Benefits

IES and TLG erroneously argue that the Sixth Circuit "rendered the NLRB impotent to enter into any meaningful settlement of alter ego claims" by allowing the "third party beneficiary Fund" to ignore the May 21, 2004 Settlement Agreement." *See* Petitioners' Brief at 10. This argument, however, is entirely premised upon a brazen misrepresentation of the terms of the Settlement Agreement.

First, as the Sixth Circuit properly observed, the Settlement Agreement said nothing about precluding PUDF from pursuing its fiduciary obligation to enforce the c.b.a., other than that the Union would recommend to PUDF to dismiss "*without prejudice*" its previously existing lawsuit against IES for fringe benefit contributions. (RE. 87-5, PUDF Response to

Defendants Motion for Partial Summary Judgment, exh. E, ¶ 2). A dismissal "without prejudice" expressly means *without* bar to refiling, *see* Fed. R. Civ. P. 41(a)(2); *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934-35 (11th Cir. 1987). The courts below expressly recognized that nowhere in the Settlement Agreement did it provide for PUDF to release the alter ego claims it might have.

Therefore, even assuming Petitioners are correct in characterizing PUDF as a "third party beneficiary" to the Settlement Agreement, there are no terms within that agreement that precluded the re-filing of its alter ego complaint. On the contrary, the term "*without prejudice*" expressly contemplated PUDF's right to re-file the complaint. PUDF did not agree to refrain from enforcing its fiduciary obligation to seek fringe benefits due, (nor could it have, because trustees of multiemployer benefit trust funds are under a fiduciary duty to act to ensure that a plan receives all funds to which it is entitled, *see* 29 U. S. C. § 1104; *see also Krohn v. Huron Memorial Hospital*, 173 F.3d 542, 547 (6th Cir. 1999)). The courts below correctly recognized that Petitioner is trying to enforce an agreement it never made!!

B. The Ability of Trust Funds to Sue For Fringe Benefit Obligations Following Union Settlement Agreements Has Been Expressly and Repeatedly Upheld by a Litany of Case Law Dating Back Several Decades.

Without any supporting authority whatsoever, Petitioners argue that because PUDF is a third party beneficiary to the c.b.a., it is necessarily a third party beneficiary of the Settlement Agreement. This flawed contention ignores the well established distinction between a pension fund and the union and is expressly rejected by applicable law.

For example, in *Bakery & Confectionery Union v. United Baking Company*, 495 F. Supp. 170, 172 (W.D. Penn. 1980), the court recognized the distinction between the fund and the union explaining:

> [T]he plaintiffs are the funds themselves, not the union, not the individual members of the union or any parties to the collective bargaining agreement. The funds appear to be separate entities and trusts with separate rights to ensure the payment of contributions to them. ***Settlement agreements could not bind the trust fund without their consent, they are proper parties to bring this suit and there is nothing in the Settlement Agreement which makes it binding upon the funds and, as a matter of fact, it is specifically excluded from affecting their rights.***

> We, therefore, hold that under the circumstances, the funds are not bound by any agreement made by the union.

Id. (emphasis added).

Similarly, in *Southern California Retail Clerks Union et al. v. Bjorklund*, 728 F.2d 1262, 1264-66 (9th Cir. 1984) the defendant argued that a union officer had fraudulently induced him into entering a collective bargaining agreement by misrepresenting his eligibility for a pension under the agreement. The court correctly noted that under traditional contract law, the trust funds, as third party beneficiaries of the collective bargaining agreements, would be subject to any contract defenses generally available against the contracting parties themselves. But the court severely limited the range of contract defenses in this context holding that traditional contract law does not apply in full force in suits brought under the LMRA and ERISA to collect delinquent trust fund contributions. The court premised its ruling on the legislative history behind 29 U.S.C. § 1145 which sought to disallow the conversion of simple collection actions brought by plan trustees into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. *Id.*

Finally, in *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 773 (9th Cir. 1986), the Ninth Circuit again addressed the issue of whether contract defenses generally available against the contracting parties themselves were available in the fund/union context. The court held that Congress and the courts

have acted to simplify trust fund collection actions by restricting the availability of contract defenses, which make collection actions unnecessarily cumbersome and costly. *Id.*

C. The Fund is Not an Intended Third Party Beneficiary of the Settlement Agreement

Petitioners reason that because PUDF is a third party beneficiary of the c.b.a., it is also a third party beneficiary of the Settlement Agreement which effectively amends the c.b.a. Petitioners' conclude from this flawed premise that PUDF cannot have greater rights under the c.b.a. than can the Union. Petitioners' base this argument upon flawed logic and disregard both the restriction of third-party beneficiary defenses in ERISA fringe benefit collection actions, *see Rozay's Transfer, Bjorklund* and 29 U.S.C. § 1145 as discussed *supra*, and the fact that the Settlement Agreement did not abrogate or terminate the c.b.a. or PUDF's responsibilities thereunder.

Petitioners attempt to distinguish the facts here from *United Baking Company*, *supra*, by arguing that the latter did not involve pension matters. Examination of this case clearly reflects that it did. The issue centered on whether pension and welfare fund obligations of a c.b.a. survived a union settlement agreement. *Id.* at 171.

Petitioners, here, as they did below, play fast and loose with the facts, again claiming that PUDF"s amended complaint alleged it is an intended third-party beneficiary to the *Settlement Agreement*.

See Petitioner's Brief at 15. This is patently false. The amended complaint clearly states that PUDF is a third party beneficiary **of the c.b.a.**, not of the Settlement Agreement (RE. 29, amended complaint, ¶ 10). Lastly, the dismissal without prejudice of the first lawsuit references an agreement of the parties to settle the issues by dismissing "without prejudice."

D. TLG Acquiesced to the Audit.

Petitioners argue that "there was never a valid reason for seeking the audit or filing suit." Petitioners' Brief at pp.10-11, and that "[e]ven the district court acknowledged that TLG should not have been sued." *Id.* at p. 11 fn. 2.

In reality, PUDF filed suit to compel the audit to include TLG. A comprehensive audit of both entities was necessary to fully investigate the alter ego allegations against TLG. When IES and TLG both initially refused to cooperate, PUDF filed a motion to compel a comprehensive audit of both IES and TLG (RE. 13, comprehensive audit motion). Petitioners fail to reveal to this Court that ***IES and TLG chose not to respond to this motion and instead*** *voluntarily agreed* ***to permit PUDF to conduct the audit.*** The District Court's docket correctly reflects this on its docket sheet as an unnumbered notation dated June 22, 2005, appearing between RE. 23 and before RE. 24, stating "terminate motions," specifically referencing the RE. 13 Motion to Compel filed by PUDF, and stating that the motion was withdrawn per letter from PUDF counsel.

PUDF completed the comprehensive audit against both IES and TLG on June 16, 2005, resulting in a debit memo (RE. 87-3, Plaintiffs' Brief in Response to Defendants' Motion for Partial Summary Judgment, Ex. B debit memo dated June 16, 2005, and revised memo dated January 4, 2006), and a revised debit memo, *id.*, after a meeting between Mr. Ruehle and Mrs. Llamas.

The District Court correctly concluded that TLG acquiesced to the audit and worked through the calculations of the potential amount of alter ego liability with the Fund (PUDF APP'X, exh. 36, pp. 656-664, defendants' written objections to audit debit memo; RE. 136, Findings, ¶ 134; App. 49a).

E. Petitioners Claims Are Not Supported By Legal Authority

Petitioners contend the Union based its request to PUDF to conduct a comprehensive audit on the fact that IES properly terminated its c.b.a. in circumvention of the Settlement Agreement. Petitioners argue that "at least two courts have recognized and rejected union attempts to circumvent settlement agreements in this matter" citing *Cement Mason's Union Local No. 592 Pension Fund v. Zappone*, 501 F. Supp. 2d 714, 722-23 (E.D. Penn. 2007) and *Rhode Island Carpenters Annuity Fund* v. *Trevi Icos Corp.*, 533 F. Supp. 2d 246 (D.R. I., 2008). *See* Petitioners' brief at p. 11. A review of *Zappone* and *Rhode Island Carpenters*, however, actually support the lower courts' decision here.

In *Zappone*, the c.b.a. did not cover the work performed, both because the employees were not union members, and because the project at issue was not within the jurisdiction of the collective bargaining agreement. Thus, no contractual obligation to pay fringe benefits existed in the first place, *id.* at 718-21. Here, a clear and definite obligation to contribute under the c.b.a *does* exist in the present matter. Thus, under *Zappone*, when a contractual obligation to contribute does exist, as it clearly does here, it is enforceable under the authority of 29 U.S.C. § 1145, *Zappone*, 501 F. Supp. 2d at 718.

Likewise, *Rhode Island Carpenters Annuity Fund*, *supra*, is a jurisdictional case where the court found the work involved was not covered by the collective bargaining agreement at issue, *id.* at 249. The instant case, by contrast, involves a c.b.a. expressly covering the work at issue, for which fringe benefit contributions are owing, and where the Union Settlement Agreement does nothing to change the c.b.a. or the benefits owing under it.

Moreover, *Operative Plasterers' & Cement Masons' Local #18 Annuity Fund v. J. P. Phillips, Inc.*, 573 F. Supp. 2d 1059 (C.D. Ill. 2008), is also inapposite. It involved a prior settlement of a union jurisdictional dispute which precluded enforcement of a collective bargaining agreement, *id.* at 1064-65. The Settlement Agreement in this case, by contrast, did nothing to abrogate either the c.b.a., its jurisdiction, or the contractual duties it imposed.

II. THE SIXTH CIRCUIT HAS NOT DECLARED "DOUBLE BREASTING ILLEGAL BUT RATHER HAS FOLLOWED ALTER EGO DOCTRINE ARTICULATED BY THIS COURT WHICH THE OTHER CIRCUITS HAVE ALSO FOLLOWED DATING BACK DECADES

Petitioner agues that the Sixth Circuit here "reached the erroneous conclusion that "double breasted operations" are illegal. *See* Petitioners' brief at p. 16. This is a brazen misrepresentation of the Sixth Circuit's opinion. Petitioners premise this erroneous contention on the following language of the Sixth Circuit's opinion:

> Alter ego liability ***may apply*** to a new, non union entity that is "merely a disguised continuance of the old [union] employer," or to a "double breasted operation consisting of "two or more coexisting employers performing the same work [that] are in fact one business, separated only in form."

See Petitioners' Brief at App. 9a-10a *Citing Trustees of the Detroit Carpenters Fringe Benefit Funds v. Indus Contracting, LLC*, 581 F.3d 313, 317-318 (6th Cir. 2009) (emphasis added). This false contention plays fast and loose with the law and deliberately ignores the Sixth Circuit's language as well as numerous Circuits' recognition of the legal validity of the foregoing statement dating back decades. The plain language of the Sixth Circuit's statement does not condemn ***all*** double breasted operations as Petitioner advocates, but rather plainly states that such liability "***may apply***"

where the courts determine that such operations are in fact a "disguised contrivance of the old employer" or "one business, separated only in form." *Id.*

The foregoing is not a blanket condemnation of "double breasted operations." On the contrary, the Sixth Circuit, as well as other circuits commonly apply the alter ego doctrine in "double breasted" situations where the facts establish a "disguised continuance" of the union entity through "coexisting employers performing the same work [that] are in fact ***one business, separated only in form.***" *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331, 336 (6th Cir. 1990); *See also Massachusetts Carpenters Central Collection Agency v. Belmont Concrete Corporation and Alger Construction Corporation*, 139 F.3d 304 (1st Cir. 1998); *Thomas Pearson, et al. v. Component Technology*, 247 F.3d 471, 486 (3rd Cir. 2001); *Local 282 v. Sandimo Materials, et al.*, 250 F.3d 120 (2nd Cir. 2001); *UA Local 848 v. Nor-Cal Plumbing, Inc., et al.*, 48 F.3d 1465, 1469-1470 (9th Cir. 1994); *Pipefitters v. Waldo R., Inc., et al*, 872 F.2d 815 (8th Cir. 1989); *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531 (4th Cir, 1985); *NLRB v. Leonard Hebert*, 696 F.2d 1120 (5th Cir. 1983).

The claim that the Sixth Circuit has declared all "double breasted operations" illegal is completely unfounded.

III. THE SIXTH CIRCUIT'S DECISION IN THIS CASE IS CONSISTENT WITH THE ALTER EGO STANDARD ARTICULATED BY THIS COURT IN *SOUTHPORT PETROLEUM CO. V. NLRB*

A. The Sixth Circuit's Ruling Does Not Condemn All Double Breasted Operations—Only Those That Are Intended To Evade Labor Obligations.

This Court set forth the universally applied alter ego standard in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942), where, the employer attempted to avoid its obligations to its union employees by making a technical change to its ownership. In determining whether there was an alter ego relationship between the two companies the Court looked to "whether there was a *bona fide* discontinuance and a true change of ownership - or- merely a disguised continuance of the old employer . . ." *Southport Petroleum Co.*, 315 U.S. at 106.

Significantly, the *Southport Petroleum* Court never addressed whether or not it required an intent to evade the union obligations as an element of an alter ego analysis because the intent was obvious from the facts of the case.

Petitioners further rely upon *Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel & Restaurant Employees*, 417 U.S. 249 (1974). This was a successor case. There was a bona fide purchase and sale and an arm's length relinquishment of control between

two independent entities. *Southport Petroleum* was an alter ego case because of the disguised continuance of the original employer. The difference between successor and alter ego lies in the fact that while a successor, "may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of the collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them," where an alter ego is subject to all of the legal and contractual obligations of the predecessor. *Howard Johnson Co.*, 417 U.S. at 261 (citing *Southport Petroleum Co.*, 315 U.S. at 106.).

Petitioners erroneously announce that the federal courts ignore these two decisions, which require that "an improper transaction is a 'disguise intended to evade' labor obligations" and apply doctrine that is wholly inconsistent [with] what a pension fund must establish in order to hold a non union entity to the CBA of a Union signatory." *See* Petitioners' Brief at 22. As discussed below, this claim does not withstand scrutiny.

B. IES and TLG Are Alter Egos Under the *Southport Petroleum* Standard

IES and TLG are clearly alter egos based upon the *Southport Petroleum* standard. As established in the facts, there was a "virtual mountain of evidence" establishing the intermingling of IES and TLGs' finances and operations. *See Trustees of the Detroit Carpenters Fringe Benefit Funds v. Industrial Contracting LLC*, 581 F.3d 313, 317 (6th Cir. 2009). Plain and simple, the creation of non union TLG by the wife of IES's owner was nothing more than a change in

structure of the employing entity that IES used to avoid its collective bargaining obligations. This modification involved change in form only— management or ownership of IES and TLG had substantially identical ownership, management, and operations.

C. Circuit Courts Consistently Apply the *Southport Petroleum* Standard

Petitioners argue that "the Circuits are inconsistent concerning what a pension fund must establish in order to hold a non union entity to the CBA of a union signatory." *See* Petitioners' brief at 22. On the contrary, the Circuits have consistently applied the *Southport Petroleum* standard in alter ego cases. The Circuits have merely developed various factors to review when determining whether or not two companies are alter egos consistent with this standard. Courts base most of these factors upon the "single employer" factors used by the NLRB. Each Circuit uses these factors to determine whether or not there has been a change in corporate form frequently used to avoid the effect of labor laws without any substantial change in ownership or management.

The Sixth Circuit, like other Circuits, looks to the circumstances surrounding a change in corporate form to determine, "whether the change resulted in a 'bona fide discontinuance and a true change of ownership' or was merely 'a disguised continuance of an old employer.'" *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986), citing *Southport Petroleum Co., supra*, at 106. To determine this, the Sixth Circuit and others have recognized that factors relevant to finding alter ego

status include "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Nelson Electric v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981), citing *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Goodman Piping Products Co., Inc., v. NLRB*, 741 F.2d 10, 12 (2nd Cir. 1984); *NLRB v. Campbell-Harris Electric, Inc.*, 719 F.2d 292, 295 (8th Cir. 1983); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 553-54 (3rd Cir. 1983), *cert denied*, 464 U.S. 1039 (1984); *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 663 F.2d 223, 226-27 (D.C. Cir. 1980); *Allcoast Transfer, Inc.*, 780 F.2d at 579. This standard is commonly referred to as the *Crawford Door* standard. Upon analyzing opinions of its sister circuits, the Sixth Circuit concluded that, "a finding of employer intent is not essential or prerequisite to imposition of alter ego status. Instead, it is merely one of the relevant factors which the Board can consider; along with the well established factors . . ."*Allcoast Transfer, Inc.*, 780 F.2d at 581.

The Sixth Circuit recognizes that an alter ego analysis should be flexible and, "under a flexible approach, no one element should become a prerequisite to imposition of alter ego status; rather, all the relevant factors must be considered together." *Allcoast Transfer, Inc.*, 780 F.2d at 582. A finding of intent to evade adds support to an alter ego finding, S*ee Fullerton*, 910 F.2d at 337.

This same flexible approach is taken by the First, Second, Third, Eleventh, and the D.C. Circuits. Each of these apply the *Crawford Door* factors and consider the

intent of the parties in creating the second company as an additional factor. None of these Circuits believe that *Southport Petroleum* required express evidence of wrongful intent as an indispensible prerequisite to the imposition of the alter ego doctrine. *See Massachusetts Carpenters Central Collection Agency, supra*, 139 F.3d 304 (1st Cir. 1998) (applying the alter ego test to parallel companies); *N.L.R.B. v. Hospital San Rafael, Inc.*, 42 F.3d 45, 354 (1st Cir. 1994); *Goodman Piping Products, Inc. v. National Labor Relations Board*, 741 F.2d 10 (2nd Cir. 1984); *Trafford Distribution Center v. National Labor Relations Board; National Labor Relations Board v. Liberty Source W, LLC and its Alter Ego, Trafford Distribution Center*, 478 F.3d 172, 179 (3rd Cir. 2007); *Board of Trustees, Container Mechanics Welfare/ Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1184 (11th Cir. 1985); *Fugazy Continental Corporation v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984).

IV. THE LOWER COURTS DID NOT CREATE A MORE LENIENT ANALYSIS OF ALTER EGO LIABILITY AND THE EVIDENCE SUPPORTED ALL OF THE DISTRICT COURT FINDINGS WHICH THE SIXTH CIRCUIT PROPERLY AFFIRMED.

A. The Sixth Circuit Did Not Uphold A Finding Of Alter Ego Liability In The Absence Of Proof Of Substantially Identical Management, Business Purposes, Operations, Equipment, Customers, Supervision And Ownership.

The District Court correctly found TLG to be IES's alter ego. It carefully weighed each finding, and balanced each appropriately. The District Court correctly found the operations factor to weigh heavily in favor of PUDF, based on the extensive testimony and documents referenced in the record. In fact, the District Court specifically noted, amongst additional alter ego facts it noted ("More facts supporting alter ego are present."), that IES and TLG have a "pervasive intermingling of funds" (RE. 136, Findings, ¶ 226). The Sixth Circuit affirmed, finding that the District Court's extensive factual findings were not clearly erroneous and also found that the Petitioners had breached their obligations to pay certain fringe benefits to the Fund.

B. The District Court Made Careful and Explicit Factual Findings of All Factors Relevant to a Finding of Alter Ego

Petitioners argue, without authority, that while they do not dispute a number of the District Court's alter ego factual findings, the District Court erred by reducing the alter ego doctrine's analytical threshold of "substantially identical" to "any similarity." Petitioners' brief at 23-24. Petitioners contend the alter ego doctrine requires each and every alter ego factor to meet the "substantially identical" threshold. This wholly distorts the District Court's opinion. Moreover, this ignores the doctrine's clear corollary which provides, "No one alter ego factor is controlling and all need not be present." *Allcoast*, *supra* at 582. A brief review of the District Court's findings demonstrate that it properly analyzed all of the factors, finding that some militate in favor of the Petitioners and others in favor of PUDF. At the end of its analysis, however, it properly apportioned more weight to the material aspects of Petitioners' business operations which demonstrated a financial and operational unity of those entities.

a. Substantially Identical Operations

The District Court held IES and TLG have a "pervasive intermingling of funds," shared staff during a significant period of time to a substantial degree (RE. 136, Findings, ¶¶ 226-227; App. 65a-66a), and noted *overwhelming* operations factors supporting alter ego (RE. 136, Findings, ¶¶ 18-68; App. 27a-36a). In the District Court's judgment, therefore, the material aspects of IES and TLG's operations, such as the lack

of any financial distinction and employee intermingling substantially outweighed the differences Petitioners relied upon to establish operational dissimilarity such as different copiers, computers, telephones and field equipment. *See* Petitioners' Brief at 2. The Court correctly found the operations factor to weigh heavily in favor of PUDF (RE. 136, Findings, ¶ 222; App. 64a).

b. Customers

The District Court correctly found that even after disregarding work TLG subcontracted to IES, IES and TLG have some of the same customers (RE. 136 Findings, ¶¶ 72-76; App. 36a-40a), and that the customers factor weighs slightly in favor of PUDF (RE. 136, ¶ 221; App. 64a).

c. Supervision

The District Court correctly found that Mr. Llamas of IES occasionally supervised TLG projects, and found that the supervision factor weights slightly in favor of PUDF (RE. 136, ¶ 219; App. 63a). The District Court found these facts weighed slightly in favor of PUDF (RE. 136, Findings, ¶¶ 69-71, 219; App. 36a, 63a).

d. Intent to Evade

The District Court found that painting employees freely floated between TLG and IES, that TLG is a non-union company, the Steven Chaney complaint and charge, and that the damages of PUDF total $186,781.62. (RE. 136, Findings, ¶¶ 9, 34, 78-79, 295; App. 27a, 30a, 40a, 84a). IES painting employees, when

they worked for TLG, had no fringe benefits reported or paid for them. The IES/TLG enterprise, by doing so, expressly and intentionally evaded the contractual obligation of the c.b.a. to report and pay fringe benefits.

The District Court also found IES subcontracting to TLG (RE. 136, Findings, ¶ 77; App. 40a). This subcontracting moved IES work to TLG, avoided the contractual obligation to report and pay fringe benefits, is evidence of intent to evade, and violated the c.b.a. prohibition on subcontracting (RE. 84-2, ex. A, c.b.a., p. 5, article XI, section one).

The express findings of the District Court clearly reflect the intent to evade established at trial. *NLRB v. Crossroads Elec., Inc.*, no. 05-1395, 178 Fed. Appx. 528, 534 (6th Cir. May 5, 2006) (unpublished) (citing *Allcoast*, 780 F.2d at 581); *Fullerton*, 910 F.2d at 337); Findings, RE. 136, ¶ 212; App 62a).

e. Ownership.

In weighing the ownership factor, the Court noted that ownership by members of the same family may be considered in establishing common ownership, *see Pipe Fitters Union Local No. 392 v. Aggressive Piping, Corp.*, 841 F. Supp. 224, 229 (S. D. Ohio, 1991) and determined that the ownership factor of alter ego weighed only slightly in favor of IES and TLG. (RE. 136, Findings, ¶¶ 1-6, 215-216; App. 26a, 62a-63a).

f. Management.

The Court held that while the management was technically different, the managerial distinctions were not as firm as would usually be the case between two distinct companies, and found this factor to weigh only slightly in favor of IES and TLG (RE. 136, Findings, ¶ 217; App. 63a).

g. Business Purpose.

The District Court held that although the business purposes were generally separate, they overlapped in the form of painting prior to the settlement with the Union, and that this factor weighed only slightly in favor of IES and TLG (RE. 136, Findings, ¶ ¶ 7-10, 218; App. 26a-27a, 63a).

h. Equipment.

The Court found IES and TLG have separate field and office equipment (RE. 136, Findings, ¶ 220; App. 63a). It also noted a large equipment rental fee paid by TLG to IES (RE. 136, Findings, ¶ 45; App. 31a-32a). Additionally, a ladder marked as "I.E.S.-lamas" (sic) was photographed and admitted into evidence (PUDF APP'X, p. 666, exh. 505). Despite the findings of separate field and office equipment, the TLG general ledger showed a large ($71,200.00) and unexplainable payment to IES for rental of IES equipment (RE. 136, ¶ 45; App. 31a-32a). Both of the Petitioners had no idea of the purpose of the equipment rental fee. (RE 154, p. 42; RE 152, p. 158).

C. Petitioners' Arguments Seek to so Restrict Alter Ego Law Such That All Labor Agreements Could Be Avoided With Ease

Under Petitioners' argument, an alter ego finding could only be made if two entities were substantially identical in all of the relevant categories. Such a requirement would reduce alter ego to a strict, extremely inflexible test that would allow two otherwise completely identical identities to avoid their legitimate labor obligations by merely transferring ownership for little or no consideration. Such a result would allow legitimate labor obligations to be avoided with reckless abandon, giving employees zero confidence their pension and other agreed-to fringe benefits would in fact be there for them.

D. Petitioners' Arguments Ignore the Overwhelming Evidence of Their Pervasive Intermingling of Funds and the Operations Factor

Although Petitioners concede that the District Court did note some similarities in operations, they attempted to focus this Sixth Circuit's attention on "facts" which they did not establish at trial. As one example, Petitioners incorrectly claimed that TLG paid its portion of the rent. To the contrary, TLG's purported "rental payment," was allegedly the management fee it paid to IES. However, this "fee" was nothing like "rent." It was arbitrary because it had no consistency from month to month or year to year.

Further, Petitioners, without an expert witness, sought to rebut the damaging testimony of PUDF's

expert Robert Scheuer by arguing "facts" on appeal relating to his background and qualification which were belied by the record (Scheuer obtained a degree in finance and did not work as a shoe salesman) (RE 154, pp. 108, 131-32). Moreover, Petitioners audaciously argued to the Sixth Circuit that because their records were so ridiculously incomplete, inaccurate and unreliable that the court should have ignored Scheuer's opinions because he based them upon such unreliable information. (RE. 87-18, PUDF Brief, Scheuer affidavit, exh. Q, ¶¶ 8 and 9). This is reflective of many of Petitioner's arguments—contentions which transcended the outrageous and audacious.

V. THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH THE PURPOSE OF PREVENTING EVASION OF LABOR OBLIGATIONS

A. The Sixth Circuit's Holding In *Resilient Floor* Was Inapplicable To The Facts Of This Case Because Resilient Floor Only Applies Where A Union Company Is Formed After A Non-Union Company That Had No Preexisting Obligations Under A Collective Bargaining Agreement

Petitioners argue that different panels of the Sixth Circuit have issued conflicting opinions respecting whether a court may find alter ego liability without proof of an intent to evade federal labor law obligations. Petitioners cite *Trs. of the Resilient Floor Decorators Ins. Fund. v. A & M Installations, Inc.*, 395 F.3d 244, 248 (6th Cir. 2005) where the Sixth Circuit held facts could not support a finding of alter ego liability if there was not "an intent to evade" because it was "clearly the focus of the alter ego doctrine" and *Allcoast, supra,*

where the court held that "No factor is controlling and all need not be present." *Id.* at 579. From this premise Petitioners' make a gigantic leap in logic to erroneously conclude that "in the Sixth Circuit, two employers can be found alter egos even if no labor obligations were ever evaded." *See* Petitioners' brief at 31.

This contention is absurd.[1] Review of Sixth Circuit precedent reveals that the sole purpose of determining alter ego status is to determine if union signatories used alter ego entities to avoid labor obligations. In the Sixth Circuit, the alter ego doctrine is an equitable doctrine "developed to prevent employers from evading obligations under the [National Labor Relations] Act merely by changing or altering their corporate form." *Allcoast Transfer*, 780 F.2d at 579. The doctrine operates to bind an employer to a collective bargaining agreement if it is found to be an alter ego of a signatory employer. *See id.* at 582-83. The Sixth Circuit adopted its test from National Labor Relations Board case law. Under this doctrine courts examine " 'whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers,

1. This is particularly true when this Court considers that the lawyers representing the Petitioners' here, recently lost the similar case of *Trustees of Detroit Carpenters Fringe Benefit Funds v. Industrial Contracting, LLC*, 581 F. 3d 313 (6th Cir. 2009) cert denied sub nom. *LaSalle Group, Inc. v. Trustees of Detroit Carpenters Fringe Ben. Funds*, 130 S. Ct. 3323 (2010) where they likewise sought this court's review. This court rejected their Petition. *Id.* The Petitioners' lawyers also represented *LaSalle Group Inc.* in its Petition to this court for review of that case. This is the Petitioners' lawyers' third bite at the apple for this court to review these same issues.

supervision and ownership." An employer's intent to evade the obligations of a collective bargaining contract is merely one of the factors to be considered and is not a prerequisite to the imposition of alter-ego status. *Fullerton Transfer*, 910 F.2d at 337. The Sixth circuit deliberately developed a flexible test reasoning that "an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape the unwanted obligations." *See Industrial Contracting*, *supra*, at 318 *citing Allcoast Transfer*, 780 F.2d at 582.

Moreover, the Petitioners' (and their lawyers') mantra that the District Court and the Sixth Circuit's rulings here violated the holding in *Resilient Floor* is wrong.

The District Court noted in one of its summary judgment opinions that the fact pattern here represents the inverse of *Resilient Floor*, because the Llamases incorporated TLG, a nonunion company in 1999 *after* IES signed the c.b.a. (RE. 98, Opinion and Order, p. 9). The District Court concluded that where a party forms a non-union company *after* a union company that had preexisting obligations under a collective bargaining agreement, *Resilient Floor*'s harsh intent holding is inapplicable. The court explained the *Resilient Floor* holding as follows:

> It appears *Resilient* did not so much make the intent factor more dispositive when a union company follows a non-union company,

> so much as find the entire application of the alter ego doctrine not appropriate, when a union company follows a non-union company and there is no preexisting labor obligation. The reasoning appears grounded in a concern about whether there is a labor agreement in place when the second company is created, as a negotiating party aware of a double-breasted operation is on notice and can bargain for the prohibition of subcontracting.

RE. 136 Findings ¶¶ 208-209, App. 60a-61a; *Trustees of Painters Union Deposit Fund v. Interior/Exterior Specialist, Co.*, 2008 WL 724355 (E.D. Mich., 2008.) p. 14. (citations omitted)

The Sixth Circuit recently affirmed and validated the foregoing factual distinction the District Court recognized clarifying its ruling in *Resilient Floor* concluding:

> An example of reverse double-breasting was involved in *Trustees of the Resilient Floor Decorators Insurance Fund v. A & M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005). In that case, a former employee of a non-union carpet sales company started a carpet installation company that hired union labor. The companies shared office and warehouse space and secretarial staff, and the president of the installation company was the former brother-in-law of the president of the sales company. *See id.* at 246-47. We found that the two companies were not alter egos,

> however, on alternative bases: (1) because the non-union carpet sales company had no preexisting labor obligations to evade, (2) because there was no "pervasive intermingling of funds and operations" as found in other alter ego cases, and (3) because the installation company's workers were, in fact, independent contractors and not "employees" under ERISA. *See id.* at 248-49, 251.
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> * * *
>
> **To the extent that *Resilient Floor* can be seen to conflict with the holding in *Allcoast Transfer* and *Fullerton Transfer*, we suggest that it should be confined to its facts. (emphasis added).**

Industrial Contracting, LLC, supra, at 318-319. (citations included).

Stated otherwise, unlike "the non-union carpet sales company" in *A&M Installations*, TLG had preexisting labor obligations it could avoid—those of IES.

B. Whether Or Not An Express Finding of Intent to Evade Need Be Part of the Alter Ego Analysis is Not at Issue Here Because the District Court Found Significant and Material Evidence of an Intent to Evade

Petitioners' make the blatant misstatement that "the district court never concluded that IES and TLG intended to evade CBA obligations. . ." *See* Petitioners' brief at 31. The District Court concluded unequivocally that: "Although IES and TLG do not share equipment, ***unlike Resilient, there is evidence of intent to evade.***" RE. 136, Findings ¶227, App. 66a; *Trustees of Painters Union Deposit Fund v. Interior/Exterior Specialist, Co.*, 2008 WL 724355 (E.D. Mich, 2008) at 17 (emphasis added). Moreover, the District Court made multiple explicit factual findings of intent to evade (RE. 136, Findings, ¶¶ 77-79; App. 40a). The District Court's findings that employees freely and substantially floated between IES and TLG, *id.* at ¶34, App. 30a, is also strong evidence of intent to evade, because the fringe benefit liability accrued as painters worked for TLG without payment of their fringe benefits.

CONCLUSION

All of the Circuit Courts apply the *Southport Petroleum* standard. Each Circuit Court reviews various factors to determine whether an employer attempted to avoid its labor obligations by making a technical change to its ownership. The Courts then determine whether there is a disguised continuance of the older employer or a bona fide change in ownership. Each Circuit Court looks at the facts surrounding the creation of a new company or second company to determine whether it was created or used to evade labor obligations. All of the Circuit Courts will find an alter ego if a review of the facts show that there was not a significant change in ownership or management and one of the companies is being used to avoid the labor obligations of the other company. It does not matter whether the intent to evade the labor obligation was express or could be inferred from the facts of the case. When direct or circumstantial evidence differs, the Courts emphasize different evidence, but where the factors are met, alter ego status is found. The Sixth Circuit's decision should be upheld and this Court should deny Petitioners' Petition for Certiorari.

Respectfully submitted,

STEPHEN D. KURSMAN
FINKEL WHITEFIELD SELIK
32300 Northwestern Highway
Suite 200
Farmington Hills, MI 48334-1567
(248) 855-6500
SKursman@FWSLaw.com

Attorneys for Respondent